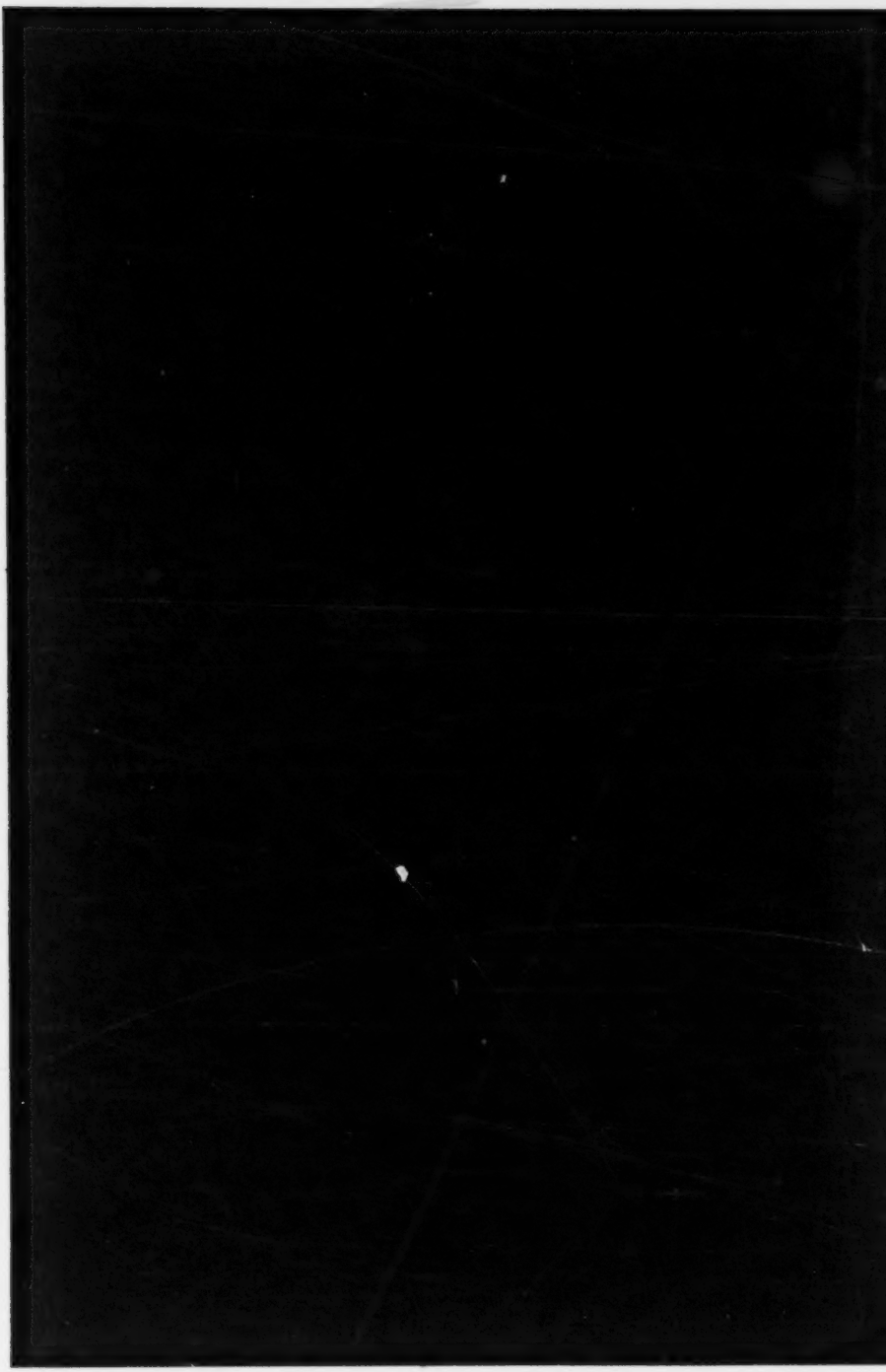

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1035

JOHN D. PITTMAN, JOSEPH L. GARVEY, AND J. D. PITTMAN TRACTOR CO., INC., A CORPORATION, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Southern Division of the Northern District of Alabama did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 39–44) is reported at 151 F. 2d 851.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 6, 1945 (R. 44). A

petition for rehearing was filed by the petitioners on November 20, 1945, and was denied by the court below on January 7, 1946 (R. 48). The petition for a writ of certiorari was filed on April 1, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

This action was originally commenced against petitioners by a *qui tam* plaintiff under the provisions of Sections 3490–3493 and 5438 of the Revised Statutes prior to the Act of December 23, 1943 (57 Stat. 608).

The question presented is whether the United States, by virtue of its entry of appearance in the action pursuant to clause (D) of the Act of December 23, 1943, may continue to prosecute the action to final judgment, or whether the court is deprived of jurisdiction, notwithstanding the entry of appearance by the United States, because the information upon which the action was based was in the possession of the United States prior to the commencement of the action by the *qui tam* plaintiff.

STATUTES INVOLVED

Rev. Stat. §§ 3490–3493 and 5438, as they read prior to the Act of December 23, 1943 (57 Stat. 608), and the provisions of that Act are set forth in Appendices A and B, pp. 15–22, *infra*.

STATEMENT

On August 5, 1943, Charles M. Hewitt, a private individual, commenced a *qui tam* action against petitioners in the United States District Court for the Southern Division of the Northern District of Alabama to recover damages and forfeitures under Rev. Stat. §§ 3490 and 5438 for the commission by petitioners of certain frauds upon the United States (R. 1–5).[1] Hewitt has since stated by affidavit (R. 30) that his action was based entirely upon facts, of which he had no prior knowledge, taken from an indictment previously returned against petitioners by a Federal Grand Jury.

On December 23, 1943, Rev. Stat. § 3491 was amended to provide, *inter alia,* that within sixty

[1] Rev. Stat. § 5438 prohibits, under penalty of fine and imprisonment, the making of a false claim against the Government of the United States or otherwise defrauding or attempting to defraud it. Rev. Stat. § 3490 provides that any person who commits such an act "shall forfeit and pay to the United States" $2,000 plus "double the amount of damages" sustained by the United States, with costs, all to be sued for in the same suit. By Rev. Stat. § 3491 as in effect prior to December 23, 1943, "Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States * * *." Rev. Stat. § 3493 prior to December 23, 1943, provided that "The person bringing said suit and prosecuting it to final judgment shall be entitled to receive" one-half the forfeiture and damages "he shall recover and collect," the other half "shall belong to and be paid over to the United States * * *." (See Appendix A, pp. 15–18, *infra.*)

days after notice to the United States of the pendency of any *qui tam* suit brought thereunder before or after the amendatory act, the United States may enter its appearance therein and carry on the suit (57 Stat. 608–609; § 3491 (D)).[2] Clause (C) of the amendatory act provides in part as follows:

> * * * If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with

[2] The 1943 amendment also repealed Rev. Stat. § 3493 and provided that if the United States carries on the suit, the court "may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought", but not more than 1/10 of the proceeds or settlement (§ 3491 (E) (1)). If the suit is not carried on by the United States, the court may award an amount, not more than ¼ of the proceeds or settlement, "which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages" (§ 3491 (E) (2)).

due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

On January 13, 1944, the district court ordered a stay in the proceedings for the sixty-day period required by clause (D) and caused notice to be served of the pendency of the action upon the Attorney General (R. 20). On March 10, 1944, the United States duly entered its appearance in the proceeding (R. 21, 22). On August 29, 1944, petitioners, defendants to the action, moved for its dismissal (R. 22–23). On March 29, 1945, Hewitt's affidavit that the action was based solely

upon facts obtained from a Federal indictment was filed in the district court. On April 11, 1945, the district court entered a decree of dismissal of the complaint (R. 31–33) on the ground that it was "without jurisdiction to proceed in the cause."

Upon appeal by the United States (R. 33), the court below reversed the ruling of the district court (R. 44), holding in its opinion (R. 39–44) that under a proper construction of the amendatory act: "It is [only] when the United States fails to adopt or prosecute the suit, and the relator carries it on, that the defendants may raise an issue with the relator as to the merit of his activity in bringing it, and on this collateral issue may defeat it utterly" (R. 42).

ARGUMENT

The sole question presented—whether the United States, after taking over a *qui tam* action not commenced on original information, may proceed against the defendants on the merits—has been affirmatively answered both by the court below and more recently by the Circuit Court of Appeals for the Third Circuit in *United States ex rel Bayarsky* v. *Brooks,* No. 8933, decided March 7, 1946.[3] These holdings are consistent with the statute and with the legislative intent. Further-

[3] Accordingly, petitioners' reliance upon the district court opinion in the *Bayarsky* case (Pet. 19) is misplaced.

more, the judgment below is not dispositive of the entire controversy since it in no way represents an adjudication of the defendants' liability on the merits. Accordingly, we submit that review by this court is unwarranted.

Petitioners' contention that the action is not maintainable by the United States is based upon the language appearing in clause (C) of the amendatory act that: "The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought * * *." Petitioners' reliance upon this provision to defeat the action after the United States has entered its appearance for the purpose of carrying it on ignores both the preceding language of the amendatory act and the legislative purpose in enacting it.

1. Clause (B) reads in part: "(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States * * *." Clause (C) governs appearances by the United States both in *qui tam* actions brought under (B) after the passage of the amendatory act and (by virtue of clause (D)) in suits pending at the time of its en-

actment. With respect to both classes of suit clause (C) in pertinent part reads:

> If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: * * *.

Then follows a proviso clause, stipulating for a reversion of the action to the *qui tam* plaintiff in the event the United States after taking over the suit fails to carry it on "with due diligence." We submit that the court below properly viewed the jurisdictional limitation expressed in the sentence following this proviso as applying only where the United States has (a) failed or refused to enter an appearance within the sixty-day period or, (b), allowed the suit to revert to the *qui tam* plaintiff through inaction. As the court below noted (R. 42), the first reference in the jurisdictional limitation in (C) is to "any such suit brought under clause (B)." The use of the term "such suit" requires a reference to the immediately preceding language of the clause which deals with suits not only commenced under (B) but also being "carried on by the person bringing the same in accordance with clause (B) above."

Ultimately the term may be referred back to clause (B) which states that "Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States * * *." See also the language in (C) that: "If the United States shall fail, or decline in writing * * * to enter any such suit, such person may carry on such suit." The limitation is plainly upon the "carrying on" by a *qui tam* plaintiff of a suit commenced by him without original information, but, we submit, has no application to the carrying on of such an action by the United States upon entry of its appearance. A holding otherwise would fail to give effect to the provision in (C) that where the United States does enter its appearance in such an action it "* * * may proceed in all respects as if it were instituting the suit." It is obviously not an infirmity to the carrying on of a suit by the United States that its officers or agents had knowledge of the facts upon which the cause of action is based prior to the institution of the proceeding.

Since it can hardly be presumed that the Congress intended a different rule to apply to suits pending at the time of the passage of the amendatory act, the conclusion above reached that a non-informing *qui tam* suit brought under (B) after the passage of the amendatory act is not subject to abatement when being carried on by the United States would seem to foreclose petitioners'

contention with reference to the present t action. This conclusion, moreover, is independentl tly reinforced by an examination of clause (D) whi nich provides for the appearance of the United St States in such pending actions. That clause in releva ant part reads "* * * and the Attorney Gener ral shall have sixty days from the date of such n notice to appear and carry on such suit in acc cordance with clause (C)." The only provision in (C) relative to carrying on such suits is that t quoted above, *viz.* that "In carrying on such suit the e United States * * * may proceed in all resp spects as if it were instituting the suit." No pr provision is made in (D) that the "carrying on" of f the suit by the United States shall also be subject ct to the jurisdictional limitation expressed in (C). Since the jurisdictional provision is antithetical al to the permission granted the Attorney General l in (D) "to appear and carry on such suit * * *," it is submitted that the absence of reference e in (D) to the jurisdictional limitation prevents its its application to pending suits in which the United States has entered an appearance.

2. Prior to the passage of the amenda atory act it was not a defense to a *qui tam* action un nder Rev. Stat. §§ 3490–3493 that the private plaintiff ff had not contributed to the discovery of the frauds ls alleged. *United States ex rel. Marcus* v. *Hess*, 317 U U. S. 537. Such a suit, although not in any way bas ased upon original information, subserved the pur rposes of the statute by obtaining for the United S States, in

cases of governmental inaction, at least one-half of the restitution to which the Government was entitled. *Ibid.* at 545, 547–548, 551–552. But private persons rapidly developed the practice during the recent war period of filing *qui tam* actions immediately upon the release of information concerning the return of criminal indictments, Congressional investigations, and the like, where the facts made public indicated that possible causes of action existed under the provisions of Rev. Stat. §§ 3490–3493 and 5438. See S. Rep. No. 291, 78th Cong., 1st Sess., p. 2. These actions were hastily filed in an effort to pre-empt the field not only against other *qui tam* plaintiffs but against the Government itself.[4] The resulting situations seriously jeopardized the Government's criminal proceedings and led the Department of Justice to recommend amendatory legislation. Its reasons are succinctly stated in the Senate Report on H. R. 1203, which bill in amended form became the Act of December 23, 1943:

> * * * The Department's principal desire for the enactment of this bill is that the United States be protected against being compelled to disclose its facts involved in any criminal prosecution it may have undertaken or is about to undertake. Their

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[4] This abuse is graphically illustrated by the facts involved in *United States* v. *Baker-Lockwood Mfg. Co.*, 138 F. 2d 48 (C. C. A. 8), vacated and remanded following passage of the amendatory act for proceedings in conformity with that act, *sub nom. Nathanson* v. *United States*, 321 U. S. 744, 746.

> experience has shown that upon filing of such civil suits, steps are soon taken to compel discovery, by taking deposition and otherwise, in the civil suits, to ascertain the facts upon which the Government is proceeding. All such matters tend to embarrass the Government in its conduct of criminal prosecutions and to assist the defendants in such prosecutions in obtaining what they otherwise would not be entitled to obtain and could not secure. (S. Rep. No. 291, 78th Cong., 1st Sess., p. 3).[5]

It is thus clear that the amendatory act was primarily designed to vest in the Attorney General control over all litigation instituted under the earlier legislation or thereafter in order that private civil suits might not impair the effective enforcement by the United States of the criminal sanctions provided in Rev. Stat. 5438 for the commission of frauds upon it. The elaborate control

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[5] Compare also the statement quoted by the Senatorial manager of the Bill (89 Cong. Rec. 7571):

"To offset this condition the Department of Justice has undertaken to file civil actions at the same time that indictments are returned. But this has been found impractical. The exact time an indictment will be returned can rarely be anticipated. Moreover, this makeshift practice does not give adequate time in which to prepare proper pleadings.

"I believe that the Congress should by legislation put a stop to this unseemly and undignified scramble. The Government should have sufficient time in which carefully to consider the advisability of bringing such suits and the nature and contents of the pleading to be filed, instead of being forced to proceed in the hasty manner which alone is now available."

provisions of the amendatory act achieved this end, permitting the Attorney General a sixty-day period within which to assay the merits of *qui tam* actions then pending or thereafter filed, and also an opportunity to prevent the defendants in criminal proceedings from utilizing such civil suits as vehicles for discovering information which they could not obtain in the criminal cases themselves. Under the amendatory act, the latter objective may be achieved either by entering an appearance and thereby obtaining an exclusive control over and right to carry on the *qui tam* suit, or by refraining from so doing and demonstrating to the court that the suit, still in private hands, had been commenced on Government information, thereby causing its dismissal.

Plainly, in the light of the foregoing, the amendatory act cannot be deemed to have intended to immunize petitioners from making statutory restitution to the United States in the event they are found to have committed the frauds alleged. As held in the *Hess* case, *supra,* the instant *qui tam* action could not have been defeated prior to the passage of the amendatory legislation on the ground that it was not based on independent knowledge, and, if sustained on the merits, would have resulted in a recovery to the Government of one-half the damages and forfeitures provided in Rev. Stat. §§ 3490 and 5438.[6] It is sub-

[6] The construction placed on the amendatory act by the court below, of course, in no way increases petitioners' potential liability, since the remaining half of the prescribed

mitted that the court below, upon consideration of the language and the legislative history of the amendatory act, properly refused to construe the act as depriving the United States of any right of recourse against petitioners for the frauds alleged.[7]

CONCLUSION

The decision below is correct and no conflict exists. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1946.

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recovery would have gone to the *qui tam* plaintiff. By virtue of clause E (1) of the amendatory act, however, any recovery now obtained will go entirely to the Government since the *qui tam* plaintiff made no contribution to the discovery of the alleged frauds.

[7] Petitioners' contention that the jurisdictional limitation is applicable to *qui tam* suits being carried on by the Government would produce equally absurd results when applied to *qui tam* actions brought after the amendatory act. Since under petitioners' construction the limitation applies, irrespective of an appearance by the Government, "whenever it shall be made to appear" that the facts upon which the *qui tam* action was based were within the prior knowledge of a Government officer or agent, a suit taken over by the Government in the belief that it was a genuine informer action would be subject to dismissal even following a trial on the merits if it could then be shown that some person in the widespread Government employ had such prior knowledge.